

2012 WL 481528 (La.App. 3 Cir.) (Appellate Brief)
Court of Appeal of Louisiana, Third Circuit.

INTERDICTION OF THEODULE PIERRE NOEL, Sr, Defendant/Appellee/2nd Appellant.

No. 20120006-CA.

January 27, 2012.

Civil Proceeding
No. 93963 - Division "J"

**Original Appeal Brief of Petitioners/ 1st Appellants Appealing a Summary Judgment Entered By the
15th Judicial District Court, Parish of Vermilion the Honorable Kristian Earles, Presiding Trial Judge**

Thomas J. Gayle (# 20824), Gayle Law Firm, LLC, 713 Kirby Street, Lake Charles, LA 70601, Counsel for Petitioners, 1st Appellants.

***i TABLE OF CONTENTS**

TABLE OF AUTHORITIES	ii
STATEMENT OF JURISDICTION	1
STATEMENT OF THE CASE AND ACTION OF THE TRIAL COURT	1
ASSIGNMENT OF ALLEGED ERRORS	1
ISSUES PRESENTED FOR REVIEW	1
STATEMENT OF THE FACTS	2
LAW AND ARGUMENT	8
Assignment of Error 1: STANDARD OF REVIEW FOR GRANTING A SUMMARY JUDGMENT AND FOR FAILING TO GRANT A CONTINUANCE TO ALLOW REASONABLE DISCOVERY	8
Assignments of Error 2: MATERIAL QUESTIONS OF FACT PRECLUDED SUMMARY JUDGMENT .	11
ANSWER TO APPEAL ON MOTION TO STRIKE AND REQUEST FOR FEES AND SANCTIONS	15
CONCLUSION	18
VERIFICATION	19
EXHIBITS	20
CERTIFICATE OF SERVICE	25

***ii TABLE OF AUTHORITIES**

<i>LeCroy v. Byrd Regional Hosp.</i> , 56 So.3d 1167 (2011).	7,8
<i>Simoneaux v. E.I. du Pont de Nemours & Co., Inc.</i> , 483 So.2d 908 (La. 1986)	9
<i>Eason v. Finch</i> , 32,157 (La.App. 2d Cir. 8/18/99) 738 So.2d 1205, writ denied, 99-2767 (La.12/10/99), 751 So.2d 861.....	9
<i>Mitchell v. Valteau</i> , 09-1095, p. 13 (La.App. 4 Cir. 1/27/10), 30 So.3d 1108,.....	1116
<i>Thompson v. South Central Bell Tel. Co.</i> , 411 So.2d 26 (La.1982)	10
<i>Baker v. Maclay Properties Co.</i> , 94-1529 (La. 1/17/95), 648 So.2d 888.....	10
<i>Dumas v. Angus Chemical Co.</i> , supra, 31,400 at p. 17, 728 So.2d at 452, and citations therein	10
<i>Hayes v. Autin</i> , 96-287 (La.App. 3 Cir. 12/26/96), 685 So.2d 691, writ denied 97-0281 (La.3/14/97), 690 So.2d 41.....	11
<i>JCM Const. Co., Inc. v. Orleans Parish School Bd.</i> , 02-0824, p.42 (La.App. 4 Cir. 11/17/03), 860 So.2d 610, 635.....	11
<i>Womack v. Stephenson</i> , 08-493 (La.App. 5 Cir. 1/13/09) 8 So.3d 1.....	11
<i>Sutton's Steel & Supply, Inc. v. Bellsouth Mobility, Inc.</i> , 00-511, 00-898, p. 4 (La.App. 3 Cir. 12/13/00) 776 So.2d 589, 592, writ denied, 01-0152 (La.3/16/01), 787 So.2d 316 (case citations omitted)	14
<i>Tritt v. Gares</i> , 98-0704, p. 6 (La.App. 4th Cir.12/23/98), 735 So.2d 659, 663.....	14
La. Code of Civil Proc. Art. 966 C	7

La. Code of Civil Proc. Art. 966	11
Louisiana Code of Civil Procedure article 2164	14
La. Code of Civil Proc. Art. 967	14
Louisiana Code of Civil Procedure article 4547	13
La. C.C. art. 390, Revision Comments - 2000, (b)	10
La. C.C. art. 389, Revision Comments - 2000, (d)	10
La. C.C.P. art. 967	10,11
La. C.C.P. art. 966 C(2)	10

*1 STATEMENT OF JURISDICTION

This Court has jurisdiction in this appeal from a final judgment of the 15th Judicial District Court, Vermilion Parish, pursuant to La. Const. Art. V §10 and La. Code of Civil Procedure art. 2083, et al. seq.

STATEMENT OF THE CASE AND ACTION OF THE TRIAL COURT

This is an interdiction proceeding brought by three (out of four) of Mr. Noel's adult children who were nominated by Mr. Noel in a Medical Power of Attorney to serve as his agents in the event a court-ordered guardianship or curatorship was ever needed. Having exhausted all other means, Petitioners sought the full, or alternatively, partial interdiction of their father, however, their petition was dismissed by summary judgement without permitting the petitioners to conduct any discovery.

ASSIGNMENT OF ALLEGED ERRORS

- I. The Trial Court erred, as a matter of law, for failing to permit adequate discovery before the summary judgment was entered.
- II. The Trial Court erred in concluding that there were no material questions of fact that precluded summary judgment.

ISSUES PRESENTED FOR REVIEW

- I. Whether the Trial Court erred for failing to grant Petitioners' request for a continuance before hearing the summary judgment in order to conduct reasonable discovery before summary judgment was granted.
- II. Whether the Trial Court erred in concluding that there were no material questions of fact that precluded summary judgment.

*2 STATEMENT OF THE FACTS

This interdiction was filed by three of the four children of Respondent seeking a full interdiction of their father, or alternatively, a limited interdiction. Mr. Noel's interdiction is necessary because he is suffering from the effects of a severe stroke, he has demonstrated to petitioners his inability to manage his personal and **financial** affairs and there is no less intrusive means to protect Mr. Noel. An interdiction proceeding was filed on their mother as well who also suffered from the effects of a series of strokes and that was pending in the 15th JDC as well; however, Mrs. Noel died on January 19, 2012. (Tr.2)

Mr. and Mrs. Noel each suffered from severe strokes, though at different times, and required full-time care in order to remain in their family home. Therefore, the Noels had full-time caregivers in their home, around the clock. Mr. Noel personally relies upon the caregivers and usually requires someone to stay with him, separate from Mrs. Noel, when she was in the home, each night. Circumstances have deteriorated since the filing of this action, and caregivers essentially manage and operate the household. (Tr.123,128)

After Mrs. Noel's mental and physical condition rapidly deteriorated in the fall of 2005, Mr. Noel became victim to the undue influence of his fourth child, Samuel. Samuel has employed a purported power of attorney granted to him by his mother to

blatantly engage in self-dealing in order to profit from his parent's poor mental and physical condition and to unduly influence their father's ability to make reasoned decisions. (Tr.123,128)

Petitioners knew that, at one time, their father and mother had substantial assets that should have been more than adequate to maintain their parents' standard of living. In early 2011, Mr. Noel threatened to start selling his farm property in order to pay for lifestyle and medical expenses; however, petitioners know that there have *3 been property sales of substantial value, a vacation home sold and they enjoy oil and gas royalties. Thus, the question arose of what happened to their parent's substantial savings. Either their father was confused of his actual worth, or if assets were actually depleted, then clearly the estate had been mismanaged. Either way, petitioners have a responsibility to their father to make certain that he is not mismanaging his assets, or being influenced by someone else that is mismanaging their affairs. The only way to determine to what degree they are being taken advantage of, is to conduct discovery. A limited interdiction may be all that is needed. (Tr. 123,128)

All attempts to assist and intervene by petitioners through a less intrusive means have been met with opposition by Samuel. The interdiction petition only came after a long process of trying to effectively communicate with their father and brother to participate in the management of their parents' health care and business affairs. In 2005, Mr. and Mrs. Noel executed Medical Powers of Attorney, prepared and notarized by Mr. Noel's current counsel, that designated all four of their children to serve as mandates, with unanimous consent. Despite this clear designation, they have been excluded from any decision-making process by Samuel's use of another power of attorney executed by his mother after her capacity diminished. (Tr.123,128)

Samuel has relied upon the second general power of attorney purportedly executed by their mother dated January 12, 2006 (but not recorded until December 2006) designating him as agent. (Tr.98) There is reason to question the execution date on the document and the validity of the power of attorney since it was executed after their mother's capacity was impaired. (Tr. 123,128) Once that power of attorney was purportedly signed, Samuel embarked on a campaign of self-dealing and acts of isolation of their parents for his personal benefit that include, but are not limited to:

- a. selling himself and his wife Pamela Andrepont property that belonged *4 to his father and mother,
- b. encumbering property with servitudes in his favor,
- c. changing farm operator of agricultural property with the Farm Services Agency of the Department of Agriculture contrary to written leases,
- d. refusing to allow his siblings to participate in the care of their parents,
- e. forcing Christine out of the primary care of her mother and then accusing her of abandonment,
- f. installing his wife Pamela Andrepont as the manager of all in-home care for the parents, regardless of the objections of the siblings,
- g. causing the caregivers to document visits with his siblings,
- h. refusing to inform his siblings when their parents had medical issues, including hospitalizations,
- i. threatening to call law enforcement to terminate siblings' visits to the family home,
- j. attempting to use **elder** protective services to keep siblings from visiting,
- k. threats of physical violence to his siblings when they confronted him, and

1. direct assurances to his siblings: “when the will is read, there won't be a penny left”. (Tr.123,128).

Recognizing the influence that Samuel exerted over their father through the use of their mother's power of attorney, Petitioners were compelled to file the present action to protect their parents and preserve their assets. One of Samuel's most blatant acts of self-dealing and acts of influence over their father was selling of their mother's separate property, by Samuel, to Samuel in which Mr. Noel joined in the transaction. The Cash Deed was filed under Clerk's file No. 21007401, July 22, 2010 wherein Samuel sold himself a portion of his mother's property. Included in the deed *5 is the following language:

“... and is further premised upon the conduct of our children in their abandonment and open displays of ingratitude and disrespect, and further, our desire to remove the possibility that this conduct will not be continued or used to undermine the ability to continue our farming operations” (Tr.99)

Ironically, that instrument was prepared by Mr. Noel's current counsel and was notarized by Mr. Verrett, an attorney-witness in the summary judgment. Mr. Noel appeared in that deed to acknowledge that it was part of Mrs. Noel's separate estate. (Tr.98)

To make matters worse, Mrs. Noel was not able to communicate - verbally or in writing - due to her declining health since the fall of 2005 (Tr. 123,128), however, in 2010, someone prepared this Deed where she sold her land, to Samuel, by Samuel, and recited as consideration the “conduct of **our** children in their abandonment and open displays of ingratitude and disrespect, and further, our desire to remove the possibility that this conduct will not be continued or used to undermine the ability to continue **our** farming operations.” Part of the recited consideration for the sale was the conduct of “our” children though Mr. Noel acknowledged it was her separate property.(Tr.99) Mr. Noel's receiving consideration for the sale of his wife's separate estate is clear evidence that there is at least a need for discovery and probably a need for at least a partial interdiction due to the undue influence exerted by Samuel. Mr. Noel's receiving consideration for the sale of his wife's separate estate, is further evidence that her Agent and mandate, Samuel, is breaching the fiduciary duty that he owes to his mother.

Recited as further consideration, is the “desire to remove the possibility that this conduct will not be continued or used to undermine the ability to continue **our** farming operations.” (Tr.99) The farm operator designated with the Farm Services *6 Agency on that property was the Agent, Samuel. Samuel's receiving consideration as part of the sale of his mother' s estate to himself, is clear evidence that there is at least a need for discovery and eventual interdiction and further evidence that her Agent and mandate, Samuel, is breaching the fiduciary duty that he owes to his mother.

Obviously, the deed contains unusual language for a property transfer, particularly from a person that could not communicate, yet, the trial court did not allow any discovery. And, the face of the Public Records demonstrates that Mrs. Noel's mandate, Samuel, with the concurrence of his father, Theodule Sr., has facilitated the sale and alienation of Mrs. Noel's property and received consideration for the sale of the property by Samuel, to Samuel, in order to “punish” the petitioners and he continued to keep selling their property.

Samuel has also relied upon the power of attorney purportedly executed by their mother in January 2006, (though it was not filed of record until December 2006) to exclude the petitioners from the care decisions concerning their mother, contrary to her written directive in her Medical Power of Attorney and to exclude his siblings from the care of their parents. (Tr.94, 123, 128) That power of attorney was relied upon to make life and death decisions concerning their mother and the medical power of attorney, and specific directives, were ignored. During the week of June 6, 2011, plaintiff, Ted Jr., was visiting with his parents at their home on his usual two-week visit when Samuel arrived and isolated Mr. Noel from him and threatened him yelling the statement that “it's f***ing on now” as he shuffled their father out of Ted's presence into a back room, not permitting any further communication between Ted and his father. (Tr.123) That type of isolation of Mr. Noel and behavior by Samuel someone capable of self-dealing - strongly indicates that a court should have at least allowed discovery and needs to order the interdiction and get involved with the *7 administration of the personal and **financial** affairs of Mr. Noel.

The list of events go on; however, for this purpose, suffice it to say that discovery is necessary to make an informed decision on the need for the interdiction, or at least partial interdiction, of Mr. Noel.

*8 LAW AND ARGUMENT

While the Code of Civil Procedure allows the filing of a summary judgment by a defendant immediately, it should only be granted after adequate discovery, or after a case is set for trial. [La. Code of Civil Proc. Art. 966 C](#). Neither of those circumstances exist in this matter. In fact no discovery has been exchanged or provided to Movers and as shown above, this is a matter that requires discovery. Petitioners acknowledge that if granted, interdiction is a harsh remedy and it needs serious consideration. The petitioners are entitled to conduct discovery or the court could have at least ordered an independent evaluation. Either way, a complete response to the summary judgment was not possible, because no discovery was conducted by the litigants or the court. If the court finds that consideration of the summary judgment was timely, then there are questions of fact that precluded summary judgment.

STANDARD OF REVIEW FOR GRANTING A SUMMARY JUDGMENT AND FOR FAILING TO GRANT A CONTINUANCE TO ALLOW REASONABLE DISCOVERY

The standard of review goes to the core of the first assignment of error in this appeal. The trial court granted the summary judgment prematurely by not allowing any discovery before the petition was dismissed. This court recently discussed the Standard of Review on the appeal of summary judgment and the need to allow reasonable discovery in [LeCroy v. Byrd Regional Hosp.](#), 56 So.3d 1167 (2011), wherein the court stated:

Our Louisiana Supreme Court has instructed us on the standard of review relative to a motion for summary judgment as follows:

A motion for summary judgment is a procedural device used when there is no genuine issue of material fact for all or part of the relief prayed for by a *9 litigant. [Duncan v. U.S.A.A. Ins. Co.](#), [06-363 (La.11/29/06)], 950 So.2d 544, [see [La.Code Civ.P. art. 966](#)]. A summary judgment is reviewed on appeal de novo, with the appellate court using the same criteria that govern the trial court's determination of whether summary judgment is appropriate; i.e. whether there is any genuine issue of material fact, and whether the movant is entitled to judgment as a matter of law. [Wright v. Louisiana Power & Light](#), [06-1181 (La.3/9/07)], 951 So.2d 1058[]; [King v. Parish National Bank](#), [04-337 (La.10/19/04)], 885 So.2d 540, 545; [Jones v. Estate of Santiago](#), [03-1424 (La.4/14/04)], 870 So.2d 1002[.] [Samaha v. Rau](#), 07-126, pp. 3-4 (La.2/26/08), 977 So.2d 880, 882-83 (footnote omitted). [Louisiana Code of Civil Procedure Article 966\(C\)\(2\)](#) provides:

The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact.

[LeCroy](#) at 1171.

As it directly relates to permitting adequate discovery, the court in [LeCroy](#) went on to state that:

[Louisiana Code of Civil Procedure Article 966\(A\)\(1\)](#) provides that a defendant is able to move for summary judgment “at any time.” Further, [La.Code Civ.P. art. 966\(C\)\(1\)](#) provides that “[a]fter adequate discovery or after a case is set for trial, a motion which shows that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law shall be granted.” The provision for adequate discovery does not grant a party an absolute right to delay a decision on a motion for summary judgment until all discovery is complete. [West v. Watson](#), 35,278 (La. App. 2 Cir. 10/31/01), 799 So.2d 1189, writ

denied, 01-3179 (La.2/8/02), 809 So.2d 140. Unless the party opposing the motion for summary judgment shows a probable injustice, a suit should not be delayed pending discovery when it appears at an early stage that there are no genuine issues of fact. *Advance Products & Systems, Inc. v. Simon*, 06-609 (La.App. 3 Cir. 12/6/06), 944 So.2d 788, writ denied, 07-26 (La.3/9/07), 949 So.2d 444. The abuse of discretion standard is used to determine if the trial court allowed adequate time for discovery. *Id.* *Prime Income Asset Mgmt., Inc. v. Tauzin*, 07-1380, pp. 13-14 (La.App. 3 Cir. 4/30/08), 981 So.2d 897, 905-06.

LeCroy at 1173.

Thus, the abuse of discretion standard is used to determine if the trial court *10 erred for failing to grant the continuance and allow time for adequate discovery, which it did not. And, the merits of the summary judgment are considered de novo.

In the case at hand, the trial court did not allow any discovery. At the time that the summary judgment was heard, petitioners had outstanding discovery pending and asked to continue the hearing on the summary judgment in order to allow the petitioners time to conduct reasonable discovery.(Tr.46) The court refused to grant the continuance and entered summary judgment dismissing the petition.(Tr.143)

Petitioners' acknowledge that it is not an abuse of the trial courts discretion in discovery matters to entertain a motion for summary judgment before discovery has been completed. *Simoneaux v. E.I. du Pont de Nemours & Co., Inc.*, 483 So.2d 908 (La. 1986). It is within the trial courts discretion to render a summary judgment or require further discovery. *Eason v. Finch*, 32,157 (La.App. 2d Cir. 8/18/99), 738 So.2d 1205, writ denied, 99-2767 (La.12/10/99), 751 So.2d 861.

However, as the Court held in *Simoneaux*, “[t]he only requirement is that the parties be given a fair opportunity to present their claim. Unless plaintiff shows a probable injustice a suit should not be delayed pending discovery when it appears at an early stage that there is no genuine issue of fact.” 483 So.2d at 912-13; *Mitchell v. Valteau*, 09-1095, p. 13 (La.App. 4 Cir. 1/27/10), 30 So.3d 1108, 1116.

The petitioners in the case at hand were not given a fair opportunity to present their claim, and injustice has resulted. This is not a situation where discovery commenced but was not concluded, or a party named the wrong defendant in the suit, or some other form of simple matter that does not dictate the need for discovery. This is an interdiction proceeding filed by three of the four of Mr. Noel's adult children, who he designated in his Medical Power of Attorney to be decision makers if he ever needed it. Petitioners are not strangers off the street that have no interest in the welfare of their parents. They are adult children who were designated by their father *11 to do this, if and when the time came.

A very similar issue was addressed by the court in *Womack v. Stephenson*, 08-493 (La.App. 5 Cir. 1/13/09 8 So.3d 1 (2009)). In *Womack*, the trial court dismissed an interdiction petition without conducting an evidentiary hearing because the interdict had a durable power of attorney in place. The court of appeal reversed finding that:

The fact that a less restrictive means, the procuration, is in effect does not end the inquiry. Plaintiff alleges, in her Petition, that Mrs. Stephenson's interests in her property are not, in fact, being protected under the procuration in favor of Mr. Hill. Plaintiff is entitled to a hearing to determine whether or not Mrs. Stephenson's interests can be protected by the procuration in favor of Mr. Hill or whether more restrictive means are warranted. The trial court erred in ruling before an evidentiary hearing was held on this issue. *Id.* at 5.

The same result should follow here. Faced with the self-dealing actions of Samuel and the influence he exerts over Mr. Noel, the only way to determine if their father needs assistance is through this proceeding and adequate discovery. The trial court denied the petitioners any opportunity to pursue this matter by at least allowing some discovery, or at least ordering its own evaluation. Therefore, this summary judgment should be reversed.

MATERIAL QUESTIONS OF FACT PRECLUDE SUMMARY JUDGMENT

If the court does consider the merits of the summary judgment, there are material questions of fact that preclude summary judgment. Petitioners agree that they must show by clear and convincing evidence that Mr. Noel is consistently unable to make reasoned decisions regarding the care of both his person and his property, or to communicate those decisions, [La. C.C. art. 390](#), Revision Comments - 2000, (b).

A person is unable to consistently make reasoned decisions if, for example, he suffers from an infirmity that intermittently deprives him of reason. A person who experiences periodic deprivations of reason can inflict substantial harm to himself or *12 his property during such bouts and is a candidate for full interdiction. In short, that a person suffering from an infirmity may experience lucid intervals does not render him ineligible for full interdiction. [La. C.C. art. 389](#), Revision Comments - 2000, (d).

Supporting and opposing affidavits must be made on personal knowledge, set forth such facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein. [La. C.C.P. art. 967](#). Ultimate or conclusory facts and conclusions of law cannot be utilized on the motion for summary judgment. *Thompson v. South Central Bell Tel. Co.*, 411 So.2d 26 (La. 1982). Specific facts must be alleged. *Baker v. Maclay Properties Co.*, 94-1529 (La. 1/17/95), 648 So.2d 888. Affidavits that are devoid of specific underlying facts to support a conclusion of ultimate “fact” are not legally sufficient to defeat summary judgment. *Dumas v. Angus Chemical Co.*, *supra*, 31,400 at p. 17, 728 So.2d at 452, and citations therein.

The mover bears the burden of proof in the motion for summary judgment. [La. C.C.P. art. 966 C\(2\)](#). Recent amendments to [art. 966](#) were intended to bring our procedure more closely into line with the Federal standard and abrogate judicial antipathy toward the motion. *Hayes v. Autin*, 96-287 (La.App. 3 Cir. 12/26/96), 685 So.2d 691, writ denied 97-0281 (La.3/14/97), 690 So.2d 41.

Respondent has failed to demonstrate the absence of material facts. [La. Code of Civil Proc. Art. 966](#). It is well established that supporting and opposing affidavits shall be made on personal knowledge and set forth facts that would be admissible in evidence. [La. C.C.P. art. 967](#). Ultimate facts and conclusions of law contained in supporting affidavits cannot be considered for purposes of summary judgment. *JCM Const. Co., Inc. v. Orleans Parish School Bd.*, 02-0824, p. 42 (La.App. 4 Cir. 11/17/03), 860 So.2d 610, 635.

Respondent filed eight affidavits with the summary judgment. (Tr.27-35) Four *13 are from medical witnesses and four are from non-medical witnesses. All of the affidavits are conclusory statements that go to the ultimate conclusion that the court has to reach. While experts can submit affidavits, pursuant to [Art. 967](#), the testimony has to comply with [Code of Evidence art. 702](#).

None of the affidavits provide a foundation for the testimony and identify what they rely upon to reach the conclusion. (Tr.27-35) Three of the doctors treat Mr. Noel and the affidavits are identical, with the exception of fill-in-the-blank portions for dates. (Tr.27-30) All three doctors are of different disciplines, none of whom specialize in mental health, and fail to provide any fundamental facts that the court needs to make a decision. The fourth physician is a gynecologist and friend of Samuel Noel and did not even conduct a medical examination in order to reach his conclusion. (Tr.30) One of the doctor witnesses, Dr. Shuffler, even bought property, below market value, from Mr. Noel after his stroke. Does anyone really expect Dr. Shuffler to testify that Mr. Noel was not competent when he sold him his waterfront camp at Cypermort Point? (Tr. 131) If discovery were permitted, it would reveal the true relationship between these witnesses and Mr. Noel and Samuel.

Three of the lay witnesses fail to recite any facts and also just reach conclusions about the ultimate issue. Mr. Verrett's affidavit provides fact statements, but that alone does not prove the absence of fact that Mr. Noel cannot make reasoned decisions on a consistent basis and says absolutely nothing about caring for his person.

The most obvious omission from the Respondent's filing was anything from Mr. Noel. [La. Code of Civil Proc. Art. 4547](#) provides the defendant the right to be present at the hearing on the interdiction and mandates that the court not conduct the hearing without the defendant present, unless good cause exists to do so. Mr. Noel was never seen or heard from, though he would have been the best person to explain *14 to the court how he handles his business affairs such as paying his bills, depositing checks, coordinating caregivers for his wife, maintenance of the farm equipment and its operation, vehicle maintenance, coordinating medical appointments, etc.

Further, as for his person: where he shops for groceries, how he does laundry, how and what he prepares for meals, what medicines he takes, what medicines his wife takes, how many grandchildren he has, what is the age of the youngest grandchild, does he still do family holidays, etc. The list goes on.

Instead of securing testimony from Mr. Noel or a caregiver who lives in the house with Mr. Noel, the court was provided with an affidavit from Sheriff Couvillion a lifelong friend of Samuel, not Mr. Noel. While the Sheriff may be an excellent law enforcement officer, his affidavit provides little or nothing probative for the ultimate outcome of this matter. He does not live with Mr. Noel, he does not see him on a daily basis, he has no medical training and he does not transact or conduct business with him.

If the court does conclude that Respondent has demonstrated the absence of material facts, the affidavit of Theodule Jr. and Catherine demonstrates a question of fact that precludes summary judgment. Ted Jr. and Catherine know their father and know what their father is capable of, and what he is not capable of. Ted is joined by his sisters who are seeking to protect their father from making reckless personal and **financial** decisions and being influenced by others that are causing harm to their parents. (Tr.123,128)

The affidavits set forth the support for the facts alleged in the petition argued above. Even if full interdiction is not needed at this time, a partial interdiction may be necessary. These witnesses know the circumstance that their father is in and understand the influence being asserted by Samuel. As Ted, Jr. succinctly stated:

Knowing the totality of the facts about my father's professional and family history, business transactions, lifestyle choices, habits and routines, he is NOT capable of administering his **financial** affairs and personal affairs. (Tr.127)

*5 Catherine works in the medical field and has an understanding of what is occurring and how her brother has been able to manipulate the situation to his advantage. Again, knowing the entirety of the situation another competent adult child concludes:

My father may be able to do certain cognitive actions, but it is apparent that he cannot engage in the thinking that is required to manage his person and his estate. (Tr.132)

The affidavits by the doctors were fill-in-the-blank statements that provide no foundation, no mental health professional, one was by a gynecologist and another by a recipient of one of Mr. Noel's many irrational property sales.

There are questions of fact that preclude summary judgment of this matter. At the least, discovery should have been permitted.

ANSWER TO APPEAL ON MOTION TO STRIKE AND REQUEST FOR FEES AND SANCTIONS

The Respondent has answered the appeal asking that two additional issues be considered: 1) a motion to strike certain parts of the petitioners' affidavits opposing the summary judgment; 2) the trial court's failure to award attorney's fees to Mr. Noel after prevailing on the dismissal.

First, the judgment appealed from is silent on the issue of the motion to strike because the trial court never considered the issue. The motion to strike was filed within five days of the hearing on the summary judgment, it was not noticed for hearing, it was not answered, it was not argued and it was not considered by the trial court. (Tr. 118) The obvious reason is that the motion is moot because the trial court granted the summary judgment regardless of what the petitioners' affidavits stated.

[Louisiana Code of Civil Procedure article 2164](#), provides that this court is limited to ruling upon what is in the record.

Appellate courts are courts of record, [which] must render judgment based on the record on appeal. [La. Code Civ. P. art. 2164](#). We may not review evidence that is not in the record, and we may not receive new evidence. Moreover, we ***16** may not even consider exhibits filed in the record if those exhibits were not also filed into evidence, unless we are otherwise authorized by law to do so (as in summary judgment procedure).

Sutton's Steel & Supply, Inc. v. Bellsouth Mobility, Inc., 00-511, 00-898, p. 4 (La.App. 3 Cir. 12/13/00), 776 So.2d 589, 592, writ denied, 01-0152 (La.3/16/01), 787 So.2d 316 (case citations omitted).

There is nothing in the record of this matter for this court to consider relative to the motion to strike as it was not considered at the trial level, and there is no judgment entered that either grants or denies the relief.

If this court were to consider the motion to strike, it will reveal that the affidavits are in proper form and based upon personal knowledge as required by [La. Code of Civil Proc. Art. 967](#). See, *Tritt v. Gares*, 98-0704, p. 6 (La.App. 4th Cir. 12/23/98), 735 So.2d 659, 663. The fact that evidence may be admissible is not the same as saying that it is made based on personal knowledge, and is not sufficient in itself to satisfy the “personal knowledge” requirement of [article 967](#). *Id.*, 98-0704 at pp. 6-7, 735 So.2d at 663. Personal knowledge encompasses only those facts that the affiant saw, heard, or perceived with his own senses. *Id.*, 98-0704 at p. 7, 735 So.2d at 663.

The affidavits provided by Theodule Noel, Jr. and Catherine Noel are based upon what they saw, heard and perceived with their own senses. (Tr. 123,128)

The appeal record is also void of any motion, evidence or judgment on the trial court's decision to deny the motion to tax petitioners with attorney's fees. There is nothing in record on that motion, and this court should not consider that part of respondent's appeal as well.

CONCLUSION

It was too soon to consider summary judgment in this matter. Discovery needed to be conducted to determine Mr. Noel's actual capacity and if interdiction was necessary, either full or partial. Since this matter was filed, the situation has continued to deteriorate, including the death of Mrs. Noel, and Mr. Noel suffering from medical conditions. This issue needs to be addressed for the sake of all involved and if the court finds that denial of the motion to continue was not an abuse of discretion, then there are material questions of fact that preclude summary judgment.

Appendix not available.